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Supreme Court, U.S.
FILED

(1)

08-244 AUG 22 2008

No. _____

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In The

Supreme Court Of The United States

STATE OF CONNECTICUT,
Petitioner,

v.

DANIEL COOK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

STATE OF CONNECTICUT'S PETITION FOR WRIT OF CERTIORARI WITH ATTACHED APPENDIX

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QUESTION PRESENTED

Where the Connecticut Supreme Court found a state statute overbroad on its face because it punishes the carrying of a dangerous instrument in situations where the instrument's dangerousness is proven by its threatened use, failing to consider fundamental First Amendment jurisprudence to the contrary permitting speech to be used as evidence of an element of a crime, should this Court grant a writ of certiorari and, in a summary disposition, reverse the judgment below on the merits or vacate the judgment and remand for reconsideration in light of *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S. Ct. 2194 (1993)?

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No. _____

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In The
Supreme Court Of The United States

STATE OF CONNECTICUT,
Petitioner,

v.

DANIEL COOK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, entered in this proceeding on June 3, 2008.

OPINION BELOW

The opinion of the Connecticut Supreme Court, which reversed the respondent's conviction for carrying a dangerous instrument and is the subject of this petition, is reported as *State v. Cook*, 287 Conn. 237, 947 A.2d 307 (2008), reh'g denied (July 9, 2008). The opinion and the order denying reconsideration are reprinted in the appendix.

JURISDICTION

The decision below was released on June 3, 2008. The petitioner's motion for reargument and reconsideration en banc was denied on July 9, 2008. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1257 (a) and Supreme Court Rule 10 (c).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution proves in pertinent part: "Congress shall make no law ... abridging the freedom of speech ...."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty or property, without due process of law ...."

RELEVANT STATUTORY PROVISIONS

Connecticut General Statutes § 53-206 (a) provides:

> **Any person who carries upon his or her person** any BB. gun, blackjack, metal or brass knuckles, or any dirk knife, or any switch knife, or any knife having an automatic spring release device by which a blade is released from the handle, having a blade of over one and one-half inches in length, or stiletto, or any knife the edged portion of the blade of which is four inches or over in length, any police baton or nightstick, or any martial arts weapon or electronic defense weapon, as defined in section 53a-3, or **any other dangerous or deadly weapon or instrument**, shall be fined not more than five hundred dollars or imprisoned not more than three years or both.

(Emphasis added.)

Connecticut General Statutes § 53a-3 (7) defines a "dangerous instrument" as "any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury ...."

Connecticut General Statutes § 53a-182 (a) (1) provides in pertinent part: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person ... [e]ngages in

fighting or in violent, tumultuous or threatening behavior...."

Connecticut General Statutes § 53a-62 (a) (1) provides in pertinent part: "A person is guilty of threatening in the second degree when ... [b]y physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury ...."

RELEVANT RULES OF THE UNITED STATES SUPREME COURT

Rule 10 provides in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. Any petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
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> ***
>
> (c) a state court ... has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 16 provides in pertinent part:

> 1. After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

STATEMENT OF THE CASE

On February 3, 2005, a jury convicted the respondent, Daniel Cook, of carrying a dangerous instrument, in violation of Connecticut General Statutes § 53-206 and § 53a-3 (7). Transcript (hereinafter T) (February 3, 2005):92.[1] The jury acquitted the respondent of second degree threatening, pursuant to Connecticut General Statutes § 53a-62 (a) (1). *Id.* at 92. On April 26, 2005, the trial court sentenced the respondent to three years of incarceration, execution suspended after one year, and five years of probation. T (April 26, 2005):34.

A. The State's Case

Peter DelFranco testified that, in March 2004, he moved into an apartment in Bridgeport, Connecticut. T (February 2, 2005):22-23. DelFranco, 71, suffered from a variety of ailments and was unable to walk on his own without using a walker, although he cooked for himself and sometimes for some of the other thirty residents of the apartment building. *Id.* at 21-22.

The walls between the apartments in DelFranco's building were thin and permitted the residents to hear everything that was transpiring in their neighbors' apartments. *Id.* at 23. Cook, who was sixty-two years

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[1] Previously, the trial court had granted the respondent's motion for judgment of acquittal in connection with the charge of disorderly conduct, pursuant to Connecticut General Statutes § 53a-182 (a) (1). T (February 2, 2005):91-92. The trial court reasoned that there was insufficient evidence that the respondent had engaged in "violent behavior." *Id.* at 91.

old at the time, lived in the apartment next to DelFranco. *Id.* at 23, 95. Initially, after moving in, DelFranco attempted to befriend Cook, making sandwiches and cake for him. *Id.* at 25. However, after approximately three weeks, Cook became a "terror" during the early morning hours between midnight and 4:00 a.m., seeking to "aggravate people" in the apartment building by running the water in his bathtub on and off, playing the radio loudly, and using "something that makes a special sound that keeps you awake." *Id.* at 23, 25, 34, 56, 62-63. Cook's behavior prevented DelFranco from sleeping at night, and it prompted DelFranco to make approximately sixteen calls to the police about these matters prior to the incident at issue. *Id.* at 23, 34. None of these complaints led to Cook's arrest. *Id.* at 56.

On June 28, 2004, sometime around 2:15 p.m., a neighbor knocked on DelFranco's door and informed him that Cook was riding up and down in the apartment building's elevator and carrying a club in his hand. *Id.* at 33-34, 150. DelFranco sat down in a chair outside his apartment's door and held a small cane in his hand. *Id.* at 34, 47. Cook exited the elevator, stared at DelFranco, and walked toward the door of his own apartment with a club on his shoulder. *Id.* at 34. DelFranco commented out loud that the club was a "weapon" because of "a piece of metal sticking out [of its] top...." *Id.* Cook "shifted the club," which was a "table leg with a piece of metal on top," and said to DelFranco, "This is for you if you bother me any more." *Id.* at 34-35. DelFranco inquired why Cook was "shaking" this club at him and warned: "Do it again and I'll call the police." *Id.* at 34. Cook responded by shaking

or waving his club at DelFranco and saying, "[T]his is for you"; *id.* at 34-35; and he was going to use the club to hit DelFranco with it "over the head" or break it over his head. *Id.* at 46, 64. DelFranco asked Cook to repeat what he had just said, and Cook complied with this request. *Id.* at 46, 64. With the aid of his walker, DelFranco went inside his apartment because he had been threatened, was afraid of being harmed, and was unable to defend himself. *Id.* at 35, 47, 59. Cook laughed at DelFranco. *Id.* at 35. DelFranco testified that he then called 911;[2] *id.* at 46; and the police arrived within minutes of his call. *Id.* at 59.

However, police testimony indicated that, at 2:49 p.m., they received a 911 call from Cook. *Id.* at 145-46, 150-52, 156. The police spoke to him, and he related that, earlier in the day, his neighbor had waved a cane at him and that, a month or two earlier, that neighbor had threatened him with a gun. *Id.* at 71-74, 78. Cook informed the police that he kept a table leg next to his door for protection. *Id.* at 76. Next, the police spoke with DelFranco, who reported that he had been sitting outside his apartment when Cook had exited his own apartment and threatened to hit him with a table leg while waving it about. *Id.* at 74-75. DelFranco then related that, when he told Cook to go back into his own apartment, Cook responded that "the next time I see you I'm going to hit you with this." *Id.* at 75. The police also spoke with Ralph DeFeo, a resident of the

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[2]DelFranco also told a defense investigator that he had placed a 911 call to the police about the incident. T (February 2, 2005):163, 165-66. In addition, the investigator testified that DelFranco had told him about being approached by Cook and verbally threatened. *Id.* at 166.

apartment building, who told them that he had observed Cook waving a table leg, but had not heard what Cook had said.[3] *Id.* at 81-82.

The police arrested Cook. *Id.* at 77. Subsequently, at the behest of most of the other residents of his apartment building, DelFranco offered not to press his case against Cook if he would move out of the building. *Id.* at 61, 65-66. DelFranco learned from a friend, who is an attorney, that Cook's arrest would facilitate his eviction from the apartment building. *Id.* at 66-67.

B. The Case Of The Defense

Cook testified as follows: At the time of the incident in question, he was sixty-two years old, had been living for six years at 71 Truman Street, and DelFranco had been his neighbor for less than a year. *Id.* at 95-96. Initially, when DelFranco had moved in, he was friendly; however, after only eight days, DelFranco complained to other residents about Cook running water in his apartment and taking showers, and DelFranco brought these complaints to the attention of the police. *Id.* at 97. In addition, DelFranco nearly had killed Cook with a baseball bat; and, on June 21, 2004,

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[3]At trial, DeFeo denied that he told the police that he had seen Cook waving a table leg around. T (February 2, 2005):160. However, after being confronted with what the police had reported about their conversation, DeFeo responded that whatever he had told the police was true because they were writing down what he was saying. *Id.* Nevertheless, DeFeo further testified that Cook was not waving the table leg, but rather holding it. *Id.* DeFeo did agree with the prosecutor that the police would not have written down anything other than what he had said. *Id.*

DelFranco had threatened to put a gun in Cook's mouth and blow him away. *Id.* at 97-98. Also, in the lobby of their building, DelFranco threatened Cook with a gun, and Cook feared for his life. *Id.* at 100 103-06. All in all, DelFranco had threatened Cook with a gun on four occasions. *Id.* at 121. In addition, DelFranco had threatened to have Cook evicted from their building. *Id.* at 100. As for the incident on June 28, 2004, Cook had exited the building's elevator and encountered DelFranco, who was standing in front of his (DelFranco's) apartment and swearing. *Id.* at 115. Later on, Cook was standing in front of the elevator and waiting to take it to the second floor when he heard DelFranco say, "I see you have a weapon." *Id.* at 113. Cook held a table leg in his hand, which he used for protection against drug users who previously had broken into his apartment. *Id.* at 113-14. Cook turned around and went back into his apartment. *Id.* at 113. Cook did not respond because he was afraid that DelFranco would hit him with a baseball bat or shoot him with a gun, given that DelFranco had a very bad temper and had sworn at him earlier in the day. *Id.* at 114-15. Cook called the police. *Id.* at 114. Cook denied threatening to break a table leg over DelFranco's head. *Id.* at 123.

C. The Decision Below

On appeal in Connecticut's Appellate Court, the state's intermediate court of appeals, Cook challenged his conviction under General Statutes § 53-206, as defined by General Statutes § 53a-3 (7), on several unpreserved grounds. One of those grounds was that this statute was unenforceable against him because it

violated the First Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, as a result of being overbroad on its face. After the briefs had been filed, Connecticut's Supreme Court transferred the appeal to itself and addressed Cook's First Amendment claim under *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), which permits reviewing courts in Connecticut to consider unpreserved constitutional allegations on direct appeal. The Connecticut Supreme Court agreed with Cook that § 53-206, as defined by § 53a-3 (7), was overbroad, and it reversed his conviction, noting as well that the jury instructions explaining this statute contained no judicial gloss that would have permitted the statute to be applied consistent with the First Amendment. *State v. Cook*, 287 Conn. 237, 242-53, 947 A.2d 307 (2008).

Specifically, the court in *Cook* concluded that, under § 53-206, as defined by § 53a-3 (7), the prohibition against carrying a dangerous instrument is overbroad because it "predicate[s]" "guilt[]" on "expressive conduct" protected by the First Amendment, namely threats to use an instrument in a way that reveals its dangerous capacity to cause death or serious physical injury. *State v. Cook*, 287 Conn. at 251. According to the *Cook* court, the offense of carrying a dangerous instrument under § 53-206 bases guilt on protected expression as a result of § 53a-3 (7)'s definition of a "dangerous instrument" as "any instrument ... which, under the circumstances in which it is used or threatened to be used, is capable of causing death or serious physical injury." *Id.* at 250. In the view of the *Cook* court, the free speech infirmity of these

provisions is a function of their failure to distinguish between unprotected "true threats" that constitute a "serious expression of intent to harm or assault" and protected threats that are "mere puffery, bluster, jest or hyperbole"; *id.* at 250; as delineated in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536 (2003), and its progeny, including *State v. DeLoreto*, 265 Conn. 145, 827 A.2d 671 (2003). The court in *Cook* went on to explain that, in the absence of such a distinction, § 53-206, as defined by § 53a-3 (7), may reach on its face such expressive conduct as "a batter in a softball game who jokes that she is going to hit the pitcher over the head unless he throws her an easy pitch to hit," which would "seriously erode[]" First Amendment protections. *State v. Cook*, 287 Conn. at 251.

Consequently, the court in *Cook* agreed with Cook's unpreserved claim that the trial court had erred in failing to instruct the jurors that he could not be convicted of carrying a dangerous instrument pursuant to § 53-206 and § 53a-3 (7) unless they determined that, on the basis of his conduct or statements, his alleged threat to use a table leg constituted a "true threat," within the meaning of *Virginia v. Black* and *State v. DeLoreto*, as opposed to "simply idle talk, banter or some other form of protected expression." *Id.* at 252-53.

REASONS FOR GRANTING THE PETITION

I. BECAUSE THE OPINION BELOW DIRECTLY CONFLICTS WITH *WISCONSIN V. MITCHELL* AND ITS PREDECESSORS, A SUMMARY DISPOSITION OF THE CASE IS WARRANTED

The petition should be granted and summary disposition of the case ordered, pursuant to Supreme Court Rule 16.1, either by way of reversing the judgment on its merits or vacating the judgment and remanding for reconsideration in light of *Wisconsin v. Mitchell*, 508 U.S. 476, 489, 113 S. Ct. 2194 (1993). Summary disposition is warranted in order to forestall the decision in *State v. Cook* from eroding this Court's First Amendment jurisprudence, most recently set out in *Wisconsin v. Mitchell*, that permits speech to be used to prove an element of a crime or motive or intent as long as the expression does not constitute the offense in and of itself. *Id.* at 489 (no First Amendment violation where race-based opinion used to prove motive for purposes of sentence enhancement); *Giboney v. Empire Storage*, 336 U.S. 490, 497-502, 69 S. Ct. 684 (1949) (no First Amendment violation where picketing used to prove illegal restraint of trade); *Haupt v. United States*, 330 U.S. 631, 641, 67 S. Ct. 874 (1947) (conversations showing allegiance to the enemy not mere expression of lawful difference of opinion with our government, but rather permissible proof of motive or intent to commit treason).

What is singular about the decision in *State v. Cook* is its failure to refer to *Wisconsin v. Mitchell* and

its predecessors in concluding that § 53-206, as defined by § 53a-3 (7), is overbroad for First Amendment purposes. No mention was made of the proposition, advanced by the petitioner in its state appellate brief, oral argument before the Connecticut Supreme Court, and motion for reargument and reconsideration en banc, that threats that are integral to proof of § 53-206, as defined by § 53a-3 (7), lack First Amendment protection under *Wisconsin v. Mitchell* because their exclusive role is limited to serving as evidence of the "nonspeech" element of that offense, namely the element of the dangerous character of the instrument that is carried. *Wisconsin v. Mitchell*, 508 U.S. at 489. The decision in *State v. Cook* blurs the crucial line separating the use of speech as evidence of crimes that are not aimed at punishing expression, which does not implicate the First Amendment, and the use of speech to prove crimes that are directly aimed at punishing expression, which indisputably implicates the First Amendment. As a matter of course, prosecutors follow this demarcation in using speech to prove their cases, and any confusion about this demarcation will necessarily have widespread and serious consequences. The *Cook* court's failure to consider whether *Wisconsin v. Mitchell* has a bearing on the case is so unmindful of this Court's First Amendment jurisprudence that a summary disposition of the case is warranted.

Instead of examining the interplay between § 53-206 and § 53a-3 (7) to ascertain whether these provisions target speech, the *Cook* court limited itself to the conclusion that they are substantially overbroad merely because they predicate guilt on expressive conduct that may take the form of protected jests or

hyperbole as well as unprotected "true threats."[4] *State v. Cook*, 287 Conn. at 251. No mention was made of the fact that the plain terms of § 53-206 do not implicate speech of any kind, but only the unprotected, physical act of carrying an instrument that is dangerous. *Wisconsin v. Mitchell*, 508 U.S. at 484 ("a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"). Section 53a-3 (7)'s definition of a dangerous instrument neither refers to, nor explicates, § 53-206's element of carrying, but only its element referring to the dangerous capacity of the instrument that is carried. Therefore, when § 53a-3 (7) defines the dangerousness of an instrument not in the abstract, but rather in terms of whether the actual use or threatened use of the instrument reveals its "capab[ility] of causing death or serious physical injury," that definition merely identifies the instrument's threatened use as one type of evidence to be examined for purposes of proving the instrument's dangerous character. The definition does not expand § 53-206's element of carrying the instrument to include its use or threatened use and the expression communicated by such threats.

The plain meaning of § 53-206, as defined by § 53a-3 (7), is reinforced by Connecticut's jurisprudence, which the *Cook* court did not address, that makes it clear that the focus of these statutes is only on an

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[4]As a result of the Connecticut Supreme Court merely characterizing the practical effect of § 53-206, as defined by § 53a-3 (7), for First Amendment purposes, this Court is free to form its "own judgment as to its operative effect." *Wisconsin v. Mitchell*, 508 U.S. at 484.

object's character, namely its capability or potential for inflicting death or serious physical injury. See *State v. Jones*, 173 Conn. 91, 95, 376 A.2d 1077 (1977); *State v. Schultz*, 100 Conn. App. 709, 721, 921 A.2d 595, *cert. denied*, 282 Conn. 926, 926 A.2d 668 (2007). Connecticut's Penal Code has other provisions that implicate the First Amendment as a result of directly punishing threats, and the messages they convey, that are elements of offenses.[5] All of the cases upon which the *Cook* court relied deal with statutes that directly punish threats in this way. *State v. Cook*, 287 Conn. at 250 (relying on *State v. Deloreto*, 265 Conn. at 151-56 (breach of peace punishing threats to commit crime against another person); *State v. Johnston*, 156 Wash. 2d 355, 363, 127 P.3d 707 (2006) (statute proscribing bomb threats); *State v. Perkins*, 243 Wis. 2d 141, 151, 626 N.W.2d 762 (2001) (statute proscribing threats against judges)). The decision in *Cook* is in direct conflict with this Court's First Amendment jurisprudence in that it seeks to inject a First

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[5] See, e.g., Connecticut General Statutes § 53a-61aa (first degree threatening); Connecticut General Statutes § 53a-62 (second degree threatening); Connecticut General Statutes § 53a-134 (a) (3) (first degree robbery); Connecticut General Statutes § 53a-135 (a) (2) (second degree robbery); Connecticut General Statutes § 53a-136 (third degree robbery); General Statutes § 53a-151a (intimidating a witness); Connecticut General Statutes § 53a-181 (a) (3) (second degree breach of the peace); Connecticut General Statutes § 53a-181a (a) (1) (creating a public disturbance); Connecticut General Statutes § 53a-181k (a) (3) (second degree intimidation based on bigotry or bias); Connecticut General Statutes § 53a-181*l* (a) (2) (third degree intimidation based on bigotry or bias); Connecticut General Statutes § 53a-182 (a) (1) (disorderly conduct); and Connecticut General Statutes § 53a-182b (a) (first degree harassment).

Amendment meaning into a crime whose pertinent elements implicate only the physical conduct of carrying an inanimate object and the character, as a dangerous instrument, of that object, and are not directed at punishing expression. *Wisconsin v. Mitchell*, 508 U.S. at 487.

Moreover, threats under § 53-206 and § 53a-3 (7) fall outside of federal free speech safeguards not only because they serve as evidence of a "nonspeech" element, namely an inanimate object's dangerous character, but also because, in operating in this way, they lose their communicative value for First Amendment purposes. Under Connecticut's jurisprudence interpreting § 53-206 and § 53a-3 (7), threats can establish a carried object's dangerous character without being successfully communicated to anyone. *State v. Jones*, 173 Conn. at 95 (irrelevant that victim did not feel threatened by use of stick). This reflects the legislative purpose of deterring the carrying of instruments which have the potential to inflict permanent disabling or disfiguring injuries. See *Schultz*, 100 Conn. App. at 729; *State v. Holloway*, 11 Conn. App. 665, 669, 528 A.2d 1176 (1987), *overruled in part on other grounds, State v. Ramos*, 271 Conn. 785, 803 n.13, 860 A.2d 249 (2004). Put another way, this Court has explained that noise and "fighting words" do not warrant the safeguards of the First Amendment because they constitute the "nonspeech" or "noncontent" "element of communication." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385-86, 112 S. Ct. 2538 (1992). Similarly, threats under § 53-206 and § 53a-3 (7) may be viewed as not implicating free speech protections because they operate so as to encompass an aspect of expression that

lacks communicative value for First Amendment purposes because it need not be successfully conveyed to the listener.

In sum, because § 53-206, as defined by § 53a-3 (7), is not overbroad for First Amendment purposes, this Court should grant the petition for certification and, in a summary disposition, either reverse the judgment in *State v. Cook* on the merits or vacate the judgment and remand for reconsideration in light of *Wisconsin v. Mitchell* and its predecessors.

II. ALTERNATIVELY, THE OVERBREADTH DOCTRINE DOES NOT COME INTO PLAY EVEN ASSUMING THAT § 53-206, AS DEFINED BY § 53a-3 (7), IS AIMED AT PUNISHING EXPRESSIVE CONDUCT

Alternatively, even assuming § 53-206, as defined by § 53a-3 (7), is aimed at punishing expressive conduct, namely the threats accompanying the carrying of an instrument, the petition should be granted and, in a summary disposition, the judgment below reversed on the merits, because § 53-206 still is not overbroad for First Amendment purposes. These statutes do not implicate a substantial amount of protected speech, when judged in relation to their plainly legitimate sweep; *New York v. Ferber*, 458 U.S. 747, 770, 102 S. Ct. 3348 (1982); because their reach will always encompass either unprotected "true threats"; *Virginia v. Black*, 538 U.S. at 343; or, if the threats portend imminent violence, either unprotected "fighting words" under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766 (1942), or unprotected incitement to violence under

Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827 (1969). It is a matter of common sense that threats manifesting an object's capacity to cause death or serious physical injury, which satisfy § 53a-3 (7)'s definition of a dangerous instrument, are incompatible with, and therefore cannot be proven by, protected threats in the form of hyperbole or jests. The *Cook* court's softball example is illustrative of this incompatibility: in the context of a friendly sporting environment, a batter's joking about hitting a pitcher with her bat if she did not receive a hitable pitch would invariably be demonstrative of the bat's capacity to hit a ball, and not its serious potential to be used as a cudgel to inflict injuries.

CONCLUSION

During oral argument in the Connecticut Supreme Court, one member of the panel asked why § 53-206 and § 53a-3 (7) should not be "fixed" to ensure that they never were applied in marginal situations to punish protected threats constituting mere jests or hyperbole. The short answer to this question is that, as shown above, the First Amendment is not implicated at all by these provisions. The longer answer is that the overbreadth doctrine was never intended to prevent the remote possibility of the misuse of these statutes in this manner; *New York v. Ferber*, 458 U.S. at 771-72; an endeavor best left either to an as applied attack or to the state legislature. Therefore, this Court should grant the petition and, in a summary disposition, either reverse the decision in *State v. Cook* on its merits or vacate the decision and remand the case for

reconsideration in light of *Wisconsin v. Mitchell* and its predecessors.

Respectfully submitted,

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August 20, 2008

No. _____

In The

Supreme Court Of The United States

STATE OF CONNECTICUT,
Petitioner,

v.

DANIEL COOK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

APPENDIX

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STATE OF CONNECTICUT *v.* DANIEL COOK
(SC 17995)
287 Conn. 237 (2008)
Rogers, C. J., and Norcott, Palmer, Zarella and Schaller, Js.

Argued January - officially released June 3, 2008

KentDrager, senior assistant public defender, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Marc R. Durso*, assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. Following an incident in which the defendant, Daniel Cook, allegedly threatened another person with a table leg, a jury found him guilty of carrying a dangerous weapon in violation of General Statutes §§

53-206 (a)[1] and 53a-3 (7).[2] The trial court rendered judgment in accordance with the jury verdict,[3] and the

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[1] General Statutes § 53-206 (a) provides in relevant part: "Any person who carries upon his or her person any BB. gun, blackjack, metal or brass knuckles, or any dirk knife, or any switch knife, or any knife having an automatic spring release device by which a blade is released from the handle, having a blade of over one and one-half inches in length, or stiletto, or any knife the edged portion of the blade of which is four inches or over in length, any police baton or nightstick, or any martial arts weapon or electronic defense weapon, as defined in section 53a-3, or any other dangerous or deadly weapon or instrument, shall be fined not more than five hundred dollars or imprisoned not more than three years or both...."

[2] General Statutes § 53a-3 provides in relevant part: "Except where different meanings are expressly specified, the following terms have the following meanings when used in this title:

* * *

"(7) 'Dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ."

We note that, although § 53-206 is not contained in the same title as § 53a3 (7), this court has used the definition of the term "dangerous instrument" set forth in § 53a-3 (7) to guide our interpretation of that term for purposes of other titles of the General Statutes when, as in the present case, to do so is not inconsistent with the statutory language at issue. See *State* v. *Ramos*, 271 Conn. 785, 796-97, 860 A.2d 249 (2004) ("even though the 'approved' definition of dangerous instrument in § 53a-3 [7] applies only to the provisions of title 53a, it guides our interpretation of the [term] as used in [General Statutes] § 29-38 because it is not inconsistent with any statutory language in § 29-38"). In light of this prior precedent, the defendant has acknowledged that the definition of the term "dangerous instrument" contained in § 53a-3 (7) is applicable to § 53-206.

[3] The trial court sentenced the defendant to a term of

(continued...)

defendant appealed.[4] On appeal, the defendant claims that (1) the trial court improperly failed to instruct the jury that the state was required to prove that the defendant's use or threatened use of the table leg constituted a "true threat," that is, a serious expression of an intent to commit an act of unlawful violence against another, and (2) because the evidence adduced at trial was insufficient to support such a finding, he is entitled to a judgment of acquittal. We agree with the defendant's claim of instructional impropriety but disagree with his claim of evidentiary insufficiency. We therefore reverse the judgment of conviction and remand the case for a new trial.

The jury reasonably could have found the following facts. In 2004, the defendant, a sixty-two year old man with mental and emotional problems, had been living in an apartment building located at 71 Truman Street in Bridgeport for approximately six years. In March, 2004, Peter DelFranco, who then was seventy-one years old, moved into the apartment next door to the defendant. The two men got along well at first, but the relationship between them soon soured. In mid-April, DelFranco placed the first of numerous calls to the Bridgeport police complaining that he was being kept awake at night by the sound of water running in the defendant's bathroom, and by a radio, which he

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[4](...continued)
imprisonment of three years, execution suspended after one year, and five years probation.

[1] The defendant appealed to the Appellate Court from the trial court's judgment, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

could hear through the "paper" thin walls separating the defendant's and DelFranco's apartments. Police who responded to the calls informed DelFranco that there was nothing that they could do and that he should complain to the building manager, which he did. Around this time, DelFranco commenced a petition drive among the other residents of the building to have the defendant evicted, and, thereafter, the landlord commenced a summary process action against the defendant. An attorney friend of DelFranco told him that if the defendant were to be arrested for some reason, that fact could be used against him in the eviction proceeding.

In the afternoon on June 28, 2004, DelFranco was in his apartment when a neighbor knocked on his door and informed him that the defendant was riding the building elevator with a wooden table leg in his hand. DelFranco immediately went out into the hallway and sat down in a chair located near the elevator to wait for the defendant. Soon thereafter, the elevator door opened, and the defendant appeared, carrying the table leg. DelFranco told the defendant, "[t]hat's a weapon because you got a piece of metal sticking out the top of it. "While waving the table leg, the defendant responded, "[t]his is for you if you bother me anymore." DelFranco asked the defendant to repeat what he had said and then asked him, "[w]hat are you shaking that at me for?" DelFranco then told the defendant that if he did "it again . . . [he would] call the police." The defendant laughed at DelFranco and again waved the table

leg. According to DelFranco, he then went in to his apartment and, with the door to his apartment open, called the police. Upon returning to the hallway, DelFranco resumed his seat near the elevator and observed that the defendant was still there, "waving" the table leg.

Shortly thereafter, Bridgeport police officer Eric Norton was dispatched to 71 Truman Street in response to a call that, according to the police, had been placed by the defendant, not DelFranco. Upon arriving, Norton proceeded to the defendant's apartment, where the defendant informed Norton that DelFranco previously had threatened him with a gun and had waved a cane at him earlier in the day.[5] Norton next spoke to DelFranco, who still was sitting in the hallway. DelFranco told Norton that he and the defendant were engaged in an ongoing dispute and that, earlier in the day, the defendant had waved a table leg at him and had threatened to hit him with it. Norton then went back to speak with the defendant, who told Norton that he carried the table leg for protection. Norton spoke to another building resident, Ralph A. Defeo, who informed him that, although he had not heard the defendant make any threatening remarks to DelFranco, he had seen him earlier in the day waving the table leg.[6]

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[5] According to the defendant, DelFranco had threatened him physically on several occasions, including once with a gun and once with a baseball bat. Between April and June of 2004, the defendant called the police several times to report DelFranco's alleged threats.

[6] At trial, however, Defeo testified that, although he had

(continued...)

The defendant subsequently was arrested and charged with threatening in the second degree in violation of General Statutes § 53a-62 (a) (1), carrying a dangerous weapon in violation of §§ 53-206 (a) and 53a3 (7), and disorderly conduct in violation of General Statutes § 53a-182 (a) (1). The case proceeded to a jury trial. At the close of the state's evidence, the trial court grantedthedefendant'smotionforajudgmentofacquittalwithrespecttothedisorderlyconductcharge. Thereafter, the jury found the defendant not guilty of the charge of threatening in the second degree and guilty of the charge of carrying a dangerous weapon. This appeal followed.

I

The defendant first claims that the trial court's jury instructions were constitutionally deficient. Specifically, the defendant contends that because, under §§ 53-206 and 53a-3 (7), the state must establish that he used the table leg in a threatening manner, the trial court was required to instruct the jury that it could not find the defendant guilty as charged unless it found that the defendant's conduct constituted a "true threat." In support of his claim, the defendant maintains that, unless that judicial gloss is placed on §§ 53-206 and 53a3 (7), the offense of carrying a dangerous weapon is constitutionally overbroad[7] in violation of the first and

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[6](...continued)
seen the defendant carrying the table leg on June 28, 2004, he never saw him wave it at anyone.

[7] The defendant also asserts that the crime of carrying a dangerous weapon under §§ 53-206 and 53a-3 (7) is facially vague. (continued...)

fourteenth amendments to the United States constitution.[8] The defendant further claims that the trial court's failure to instruct the jury in that manner was harmful error. We agree with the defendant.[9]

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[7](...continued)
The defendant, however, has not articulated how his facial vagueness claim differs in any way from his overbreadth claim. We therefore consider the latter claim only.

[8] The first amendment to the United States constitution, which is made applicable to the states through the due process clause of the fourteenth amendment; e.g., *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 489 n.1, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996); provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

[9] Because the defendant's claim is unpreserved, he seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989). "Under *Golding*, a defendant may prevail on unpreserved claims only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Citation omitted; internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 359-60, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). The defendant's claim is reviewable because the first two prongs of *Golding* are met. For the reasons set forth hereinafter, we also conclude that the defendant is entitled to prevail under the second two prongs of the *Golding* test.

Before turning to the merits of the defendant's claim, we set forth the trial court's jury instructions with respect to the charge of carrying a dangerous weapon. The court instructed the jury in relevant part: "In count two of the information, [the defendant] is charged with carrying a dangerous weapon. Under § 53-206 . . . a person is prohibited from carrying on his person a dangerous instrument. In order for you to find the defendant guilty of this charge, the state must prove two elements beyond a reasonable doubt. [First] a dangerous instrument existed. If you find that a dangerous instrument existed, you must also find that . . . [the] dangerous instrument was carried on the person of the defendant on June 28, 2004.

"I will now review those two elements with you. The first element the state must prove beyond a reasonable doubt is that a dangerous instrument existed. I charge you that the table leg that is in evidence . . . is not a dangerous instrument per se. Whether or not the table leg became a dangerous instrument in this case is a question of fact for you to decide, a fact which the state must prove beyond a reasonable doubt.

"If you find [that] the table leg was threatened to be used by the defendant in this case, you must consider the table leg's potential for serious physical injury in conjunction with the manner and circumstances of its threatened use. A dangerous instrument is defined by . . . § 53a-3 (7). That statute provides that a dangerous instrument means any instrument which, under the circumstances in which it was threatened to be used, was capable of causing serious physical injury. Any item,

even if harmless under normal use, may be found . . . to be a dangerous instrument if, under the circumstances of its threatened use, it is readily capable of causing serious physical injury.

"The term 'serious physical injury' is also defined by a specific statute . . . . Section 53a-3 (4) . . . provides that a serious physical injury means physical injury which creates a substantial risk of death or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ. If you find beyond a reasonable doubt that the table leg was a dangerous instrument due to the circumstances of its threatened use by the defendant, you may move on to the second element.

"The state must also prove beyond a reasonable doubt that the dangerous instrument was carried on the person of the defendant. In other words, you must be satisfied that the defendant had physical possession of a dangerous instrument. If you find that the state has proven beyond a reasonable doubt both of the elements of carrying a dangerous weapon, then you shall find the defendant guilty. On the other hand, if you find that the state has failed to prove beyond a reasonable doubt either one of the elements, you shall . . . find the defendant not guilty. . . ."[10]

The law governing the defendant's claim is well established. "A clear and precise enactment may . . . be overbroad if in its reach it prohibits constitutionally

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[10] The defendant raised several objections to the court's instructions. Those objections, however, are not directly relevant to the constitutional issue that the defendant raises on appeal.

protected conduct. . . . A single impermissible application of a statute, however, will not be sufficient to invalidate the statute on its face; rather, to be invalid, a statute must reach a substantial amount of constitutionally protected conduct. . . . A [defendant] may challenge a statute as facially overbroad under the first amendment, even if the [defendant's] conduct falls within the permissible scope of the statute, to vindicate two substantial interests: (1) eliminating the statute's chilling effect on others who fear to engage in the expression that the statute unconstitutionally prohibits; and (2) acknowledging that every [person] has the right not to be prosecuted for expression under a constitutionally overbroad statute. . . . Thus, the [defendant] has standing to raise a facial overbreadth challenge to the [statute] and may prevail on that claim if he can establish that the [statute] reaches a substantial amount of constitutionally protected conduct even though he personally did not engage in such conduct." (Internal quotation marks omitted.) *State* v. *DeLoreto*, 265 Conn. 145, 167, 827 A.2d 671 (2003).

It is well established that this court has a duty "to construe statutes, whenever possible, to avoid constitutional infirmities . . . ." (Citation omitted; internal quotation marks omitted.) *Denardo* v. *Bergamo*, 272 Conn. 500, 506 n.6, 863 A.2d 686 (2005); see also *State* v. *Indrisano*, 228 Conn. 795, 805, 640 A.2d 986 (1994) ("in evaluating[a] defendant's challenge to the constitutionality of [a] statute, we read the statute narrowly in order to save its constitutionality, rather than broadly in order to destroy it"). "[W]hen called [on] to interpret a statute, we will search for an effective and constitutional construction that

reasonably accords with the legislature's underlying intent." (Internal quotation marks omitted.) *State* v. *Floyd*, 217 Conn. 73, 79, 584 A.2d 1157 (1991). This principle directs us to "search for a judicial gloss . . . that will effect the legislature's will in a manner consistent with constitutional safeguards." Id.

Our application of these principles in *State* v. *DeLoreto*, supra, 265 Conn. 145, guides our resolution of the present case. In *DeLoreto*, the defendant, Dante DeLoreto, was charged with two counts of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a)[11] after he allegedly confronted and threatened Wethersfield police officers on two separate occasions. Id., 148-50. After a court trial, the court found DeLoreto guilty of both counts. See id., 151. DeLoreto appealed, claiming, inter alia, that § 53a-181 (a) was unconstitutionally overbroad because his convictions were based on protected speech. Id., 151-52. The state asserted that DeLoreto's offending statements

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[11] General Statutes § 53a-181 (a) provides: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do. For purposes of this section, 'public place' means any area that is used or held out for use by the public whether owned or operated by public or private interests."

had constituted true threats. Id., 152. In agreeing with the state, we explained the principles underlying the true threats doctrine that previously had been set forth by the United States Supreme Court in *Virginia* v. *Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). See *State* v. *DeLoreto*, supra, 152-56. "The hallmark of the protection of free speech is to allow free trade in ideas-even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the [f]irst [a]mendment ordinarily denies a [s]tate the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. . . . The [f]irst [a]mendment affords protection to symbolic or expressive conduct as well as to actual speech. . . .

"The protections afforded by the [f]irst [a]mendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution. . . . The [f]irst [a]mendment permits restrictions [on] the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .

"Thus, for example, a [s]tate may punish those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . Furthermore, the constitutional guarantees of free speech and free press do not permit a [s]tate to forbid or proscribe advocacy of the use of force or of law violation

except [when] such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . And the [f]irst [a]mendment also permits a [s]tate to ban a true threat. . . .

"True threats encompass those statements [when] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. . . . *Virginia* v. *Black*, [supra, 538 U.S. 358-60; see also, e.g., *In re Douglas D.*, 243 Wis. 2d 204, 230-31, 626 N.W.2d 725 (2001) ("'[T]rue threat' is a constitutional term of art used to describe a specific category of unprotected speech. . . . This category, although often inclusive of speech or acts that fall within the broader definition of 'threat,' does not include protected speech. . . . Therefore, states may, consistent with the [f]irst [a]mendment, prohibit all 'true threats.'" [Citations omitted.])].

"The United States Court of Appeals for the Fifth Circuit has articulated the rationale underlying the removal of true threats from first amendment protection. The notion that some expression may be regulated consistent with the first amendment . . . starts with the already familiar proposition that expression has special value only in the context of dialogue: communication in which the participants seek to persuade, or are

persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . . It is not plausible to uphold the right to use words as projectiles [when] no exchange of views is involved. . . . *Schackelford* v. *Shirley*, 948 F.2d 935, 938 (5th Cir. 1991), quoting L. Tribe, American Constitutional Law (2d Ed. 1988) § 12-8, pp. 836-37.

"That court further stated that, [a]s speech strays further from the values of persuasion, dialogue and free exchange of ideas the first amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to enact statutes that effectively neutralize verbal expression. *Schackelford* v. *Shirley*, supra, 948 F.2d 938. Finally, that court concluded that, as expansive as the first amendment's conception of social and political discourse may be, threats made with specific intent to injure and focused on a particular individual easily fall into that category of speech deserving no first amendment protection. Id. Thus, [one] must distinguish between true threats, which, because of their lack of communicative value, are not protected by the first amendment, and those statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected. See *Watts* v. *United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (statement that speaker would shoot president of United States made at political rally constituted protected political hyperbole).

"In the context of a threat of physical violence, [w]hether a particular statement may properly be con-

sidered to be a threat is governed by an objective standard whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . Although a threat must be distinguished from what is constitutionally protected speech . . . this is not a case involving statements with a political message. A true threat, [when] a reasonable person would foresee that the listener will believe he will be subjected to physical violence [on] his person, is unprotected by the first amendment. . . . *United States* v. *Orozco-Santillan*, 903 F.2d 1262, 1265-66 (9th Cir. 1990) (applying 18 U.S.C. § 115, which prohibits threatening to assault federal law enforcement officer). Moreover, [a]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. Id., 1265." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 153-56.

Finally, in *DeLoreto*, we explained that, in the absence of a judicial gloss interpreting § 53a-181 (a) as applying only to true threats, the provision could be construed as unconstitutionally overbroad. Id., 166. We therefore recognized that such a gloss was necessary to save the statute from constitutional infirmity. Id., 166-67; see also *State* v. *Skidd*, 104 Conn. App. 46, 55, 932 A.2d 416 (2007) (observing that *DeLoreto* "acknowledged that in order for a threat to be prohibited by statute in Connecticut, that threat must rise to the level of a 'true threat'").

In the present case, the state alleged that the defendant had violated § 53-206 by carrying a

dangerous instrument within the meaning of General Statutes § 53a-3 (7), which defines a dangerous instrument in relevant part as "any instrument . . . which, under the circumstances in which it is *used* or . . . *threatened* to be used, is capable of causing death or serious physical injury . . . ." (Emphasis added.) Thus, for purposes of the present case, the state was required to establish that the defendant's conduct in waving the table leg, or the defendant's conduct coupled with his remarks, rendered the table leg a dangerous instrument for purposes of §§ 53-206 and 53a-3 (7). Under this court's decision in *DeLoreto*, however, the defendant was entitled to an instruction that he could be convicted as charged only if his statements or use of the table leg constituted a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole. See *State* v. *DeLoreto*, supra, 265 Conn. 155-56; see also *State* v. *Johnston*, 156 Wash. 2d 355, 363, 127 P.3d 707 (2006) (unless statute proscribing bomb threats "is given a limiting instruction so that it proscribes only true threats, it is overbroad"); *State* v. *Perkins*, 243 Wis. 2d 141, 151, 626 N.W.2d 762 (2001) (unless statute proscribing threats against judges is given limiting instruction so that it proscribes only true threats, it is unconstitutional). Because the circumstances surrounding the alleged threat are critical to the determination of whether the threat is a true threat, the trial court also should have instructed the jury to consider the particular factual context in which the allegedly threatening conduct occurred, which, in the present case, would include DelFranco's reaction to it

and the defendant's actions before and after his allegedly threatening conduct.

Because the trial court's jury charge contained no reference to the requirement of a true threat-in other words, because the court's instructions did not include the judicial gloss on §§ 53-206 and 53a-3 (7) that is necessary under *DeLoreto*-the jury could have found the defendant guilty on the basis of conduct that did not rise to the level of a true threat. Consequently, under the trial court's instructions, the jury's finding of guilty could have been predicated on expressive conduct protected by the first amendment.

The state asserts that the crime of carrying a dangerous weapon, with which the defendant had been charged in the present case, does not implicate the first amendment because it "does not strike against pure speech . . . but rather various combinations of physical conduct plus speech," and because "[s]peech that, by its very utterance," conveys a threat to use an object in a manner capable of causing serious physical injury automatically falls within the category of unprotected true threats. With respect to the state's first assertion, it is well established that "[t]he [f]irst [a]mendment affords protection to symbolic or expressive conduct as well as to actual speech." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 154. The state's second assertion begs the question to be answered by the jury upon applying the true threats doctrine. Under the state's reasoning, a batter in a softball game who jokes that she is going to hit the pitcher over the head with her bat unless he throws her an easy pitch to hit could be found guilty of carrying a

dangerous weapon pursuant to a jury instruction that does no more than mirror the literal language of §§ 53-206 and 53a-3 (7). As this hypothetical illustrates, the first amendment would be seriously eroded if we were to adopt the state's view that any statements or conduct conveying a threat to use an otherwise innocuous item in a manner capable of causing serious physical injury may fall within the purview of §§ 53-206 and 53a-3 (7) irrespective of whether the threat reasonably may be characterized as a true threat. As a general matter, moreover, whether such expressive conduct represents a true threat is to be decided by the jury. See, e.g., *United States* v. *Malik*, 16 F.3d 45, 51 (2d Cir.), cert. denied, 513 U.S. 968, 115 S. Ct. 435, 130 L. Ed. 2d 347 (1994); *United States* v. *Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983), cert. denied, 467 U.S. 1228, 104 S. Ct. 2683, 81 L. Ed. 2d 878 (1984). We therefore agree with the defendant that the trial court improperly failed to instruct the jury that it could not find the defendant guilty of carrying a dangerous weapon under §§ 53206 and 53a-3 (7) unless it found, on the basis of the defendant's conduct or statements, that his alleged threat to use the table leg constituted a true threat and not simply idle talk, banter or some other form of protected expression.

It is well established that a "defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled." (Internal quotation marks omitted.) *State* v. *Spillane*, 255 Conn. 746, 757, 770A.2d898(2001)."[T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt

that the error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *Neder* v. *United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); accord *State* v. *Gerardi*, 237 Conn. 348, 362, 677 A.2d 937 (1996). The defendant contends that the instructional error was not harmless beyond a reasonable doubt.

Although, as we have explained, the state disputes that the trial court's instructions on the charge of carrying a dangerous weapon were improper, the state does not claim that those instructions, if constitutionally defective, were harmless beyond a reasonable doubt. We also see no reason to disagree with the defendant's contention that the instructions were harmful. In light of the history between the defendant and DelFranco, and DelFranco's conduct before, during and after the defendant's allegedly unlawful use of the table leg, a properly instructed jury could have found that a reasonable person in the defendant's position would not have foreseen that his statements and actions would be interpreted by DelFranco as a serious expression of an intent to harm but, rather, as mere banter, jest or exaggeration. Accordingly, the defendant's conviction of carrying a dangerous weapon cannot stand.

II

The defendant next claims that he is entitled to a judgment of acquittal because the evidence was insufficient to permit a finding that his conduct (1) was a true threat rather than constitutionally protected hyperbole, puffery or bravado, and (2) constituted a

present threat, as distinguished from a future threat, to use the table leg in a manner capable of causing serious physical injury. We reject both of the defendant's claims.

A

We first address the defendant's contention that no reasonable juror, aware of the relationship between the defendant and DelFranco, could conclude that a reasonable person in the defendant's position should have foreseen that DelFranco would have interpreted the defendant's conduct as a serious expression of an intent to harm. In support of his claim, the defendant places particular reliance on DelFranco's reaction to the defendant's alleged misconduct as demonstrating that DelFranco himself did not take the defendant seriously. In particular, the defendant relies on the fact that DelFranco left his front door open when he entered his apartment to call the police, that he returned to the hallway after doing so, and that he waited with the defendant until the police arrived. The defendant contends that, at most, the evidence reveals "a rather pathetic history of problems between two older men who apparently had trouble living next to one another . . . ." The defendant further notes that it was DelFranco, rather than the defendant, who initiated the altercation between the two men by confronting the defendant about his possession of the table leg, and that DelFranco appeared to goad the defendant into using the table leg in an aggressive manner.

"The standard of review we [ordinarily] apply to a claim of insufficient evidence is well established. In

reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Lopez*, 280 Conn. 779, 808, 911 A.2d 1099 (2007). In *DeLoreto*, however, we explained that "[t]his [c]ourt's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated. . . . In cases [in which] that line must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the [f]irst [a]mendment . . . protect. . . . We must [independently examine] the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. . . . *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). We recently have reiterated this de novo scope of review in free speech claims in *DiMartino* v. *Richens*, 263 Conn. 639, 661-62, 822 A.2d 205 (2003) . . . ." *State* v. *DeLoreto*, supra, 265 Conn. 152-53.

We conclude that the evidence was sufficient to support a finding that a reasonable person in the defendant's position would have foreseen that the defendant's statements and actions would be interpreted by DelFranco as a serious expression of an intent to harm. It is true, as the defendant claims, that DelFranco's reaction to the defendant's conduct suggests that he was not genuinely concerned for his safety, despite the history between DelFranco and the defendant. It also is true that a juror, apprised of all the relevant facts, reasonably could conclude that the defendant's actions were nothing more than mere puffery or bravado, prompted by DelFranco's own provocative behavior toward the defendant. Nevertheless, a reasonable juror also could find, on the basis of this same evidence, that the defendant appeared to have reached his breaking point and intended to take strong action against DelFranco if DelFranco did not stop "bother[ing]" him. Moreover, the defendant himself acknowledged that he carried the table leg for use as a weapon, albeit in self-defense. Because the defendant's statement that "[t]his [table leg] is for you if you bother me anymore" constitutes a threat, "[t]he question then becomes whether a reasonable person would have believed that the [threat], taken in context, [was] mere hyperbole or [a joke] and, thus, protected by the first amendment." Id., 156-57. In light of the troubled relationship between DelFranco and the defendant, and the real potential for volatility created by their ongoing and contentious disputes, we cannot say that the evidence necessarily was insufficient to support a finding that the

defendant's statements and conduct amounted to a true threat.[12]

B

The defendant also claims that he is entitled to a judgment of acquittal because the evidence failed to establish that his threatened use of the table leg constituted a present threat, rather than a future threat, to use the table leg in a manner capable of causing serious physical injury. In support of this claim, the defendant contends that "to prove a crime based on a present threat, the state must prove that the threat is one to cause injury at the same time and place where the accused makes the threat. . . . Otherwise there would be no distinction between crimes based on present threats and those based on future threats." (Citation omitted.) The defendant further asserts that, "[a]t most, the state's evidence showed . . . that [the] defendant allegedly threatened to use the table leg at some time in the future and then only if . . . DelFranco continued to bother or threaten him."

The defendant has provided no authority, and we are aware of none, that the crime of carrying a dangerous weapon under §§ 53-206 and 53a-3 (7) requires proof of a threat to cause immediate physical

---

[12] The defendant also claims that his alleged threat was nothing more than an expression of his right to bear arms in self-defense. Although a reasonable juror could conclude that the defendant possessed the table leg only for defensive purposes, for the reasons that we previously have discussed, we reject the defendant's contention that the evidence required such a conclusion.

harm to the victim.[13] Although it is true, as the defendant maintains, that some crimes are characterized by the immediacy of the threat posed; see, e.g., *State* v. *Childree*, 189 Conn. 114, 123, 454 A.2d 1274 (1983) ("[t]he use or threatened use of immediate physical force is the element which distinguishes larceny from robbery"); there is nothing in the language of either § 53-206 or § 53a-3 (7) to suggest that the crime of carrying a dangerous weapon, as prohibited by those provisions, is one of them. Cf. General Statutes § 53a-62 (a) ("[a] person is guilty of threatening in the second degree when: (1) [b]y physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury"). Imminence, moreover, is not a requirement under the true threats doctrine. *State* v. *DeLoreto*, supra, 265 Conn. 158.

We also disagree with the defendant's assertion that there is an inadequate temporal relationship between the carrying of a particular object or instrument, and the threat to use it in a manner capable of causing serious physical injury, merely

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[13] The only case on which the defendant relies, *People* v. *Vasquez*, 136 Misc. 2d 1057, 1058-59, 519 N.Y.S.2d 624 (1987), is inapposite because it involved the crime of "menacing" in violation of New York Penal Law § 120.15, a crime similar to the offense of threatening under this state's penal code. In contrast to the crime of carrying a dangerous weapon, however, the crime of menacing under New York law requires proof that the defendant "intentionally place[d] or attempt[ed] to place another person in fear of imminent serious physical injury." N.Y. Penal Law§ 120.15 (McKinney 1987). Accordingly, the defendant's reliance on *Vasquez* is misplaced.

because the threat is conditioned on some future conduct by the target of the threat. As the defendant concedes, a threat, by definition, is an expression of an intent to cause some future harm.[14] Consequently, the defendant's threatened use of the table leg to inflict serious bodily injury against DelFranco, in the event that DelFranco continued to bother him, constitutes a violation of §§ 53-206 and 53a3 (7) if the threat is found to be a true threat not protected by the first amendment.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

---

[14] A threat is defined as "an indication of something impending and usu[ally] undesirable or unpleasant . . . as . . . an expression of an intention to inflict evil, injury, or damage on another usu[ally] as retribution or punishment for something done or left undone . . . ." Webster's Third New International Dictionary.

SUPREME COURT
STATE OF CONNECTICUT

NO. S.C. 17995

STATE OF CONNECTICUT

V.

DANIEL COOK : **JULY 9, 2008**

ORDER

THE MOTION OF THE STATE OF CONNECTICUT, FILED JUNE 11, 2008, FOR RECONSIDERATION AND REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

/s/ Michele T. Angers

MICHELE T. ANGERS
CHIEF CLERK

NOTICE SENT: JULY 10, 2008
HON. JULLIETT L. CRAWFORD
CLERK, BRIDGEPORT SUPERIOR COURT AT G.A. 2, (CR04-200586S)
REPORTER OF JUDICIAL DECISIONS
MITCHELL S. BRODY, SENIOR ASSISTANT STATE'S ATTORNEY

A-27

KENT DRAGER, SENIOR ASSISTANT PUBLIC DEFENDER

ct 612/070639

(STAMP RECEIVED - JULY 11, 2008)

No. 08-244

FILED
SEP 19 2008

In The
Supreme Court of the United States

STATE OF CONNECTICUT,

Petitioner,

v.

DANIEL COOK,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Connecticut Supreme Court somehow violated the federal constitution by merely construing its own state statutes (which criminalize the carrying of an otherwise innocuous item, like a cane or baseball bat or table leg, when that item is threatened to be used in a manner in which it is capable of causing serious physical injury) as applying only when the person actually makes a "true threat" to use the item as a dangerous instrument and then by ordering the trial court to conduct a new trial before jurors properly instructed on the Connecticut Supreme Court's construction of the applicable statutes?

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The respondent, Daniel Cook, respectfully asks this Court to deny the prosecution's Petition seeking review of the decision and judgment of the Connecticut Supreme Court in *State of Connecticut v. Daniel Cook*, 287 Conn. 237, 947 A.2d 307 (6/3/2008).

A. INTRODUCTION

1. Contrary to the Assertion of the Prosecution, the Connecticut Supreme Court Did Not Hold Any Connecticut Statutes to be Unconstitutionally Overbroad on Their Face; Instead, the Connecticut Supreme Court Merely Construed Its Own State Statutes

As an initial matter, it should be noted that the assertion by the prosecution in its Petition (p.i; see also pp.10,13,17), that the Connecticut Supreme Court reversed the respondent's conviction under C.G.S. §53-206 & C.G.S. §53a-3(7) for carrying a dangerous instrument on the basis that these provisions are "overbroad on their face" under the First Amendment, is simply not an accurate description of what the Connecticut Supreme Court held in *State v. Cook*, supra. In fact, in *Cook* the Connecticut Supreme Court reversed the respondent's conviction based on an instructional error by the trial court in not instructing the jury with the "true threat" judicial gloss required by the way that Connecticut construes statutes (like those as charged in this case) which criminalize the making of a threat. See 287 Conn. at 246-251. In doing so, the Connecticut Supreme Court

was merely following well established law in Connecticut with regard to the construction of statutes that have the making of a threat as an essential element thereof. See, *e.g.*, *State v. DeLoreto*, 265 Conn. 145, 152-156, 827 A.2d 671 (2003) (where, at the urging of the same state's attorney office, the Connecticut Supreme Court construed the term "threat" as used in another part of the state penal code, to refer to the constitutionally punishable class of "true threats"). Thus, all the Connecticut Supreme Court did in *Cook* was to apply the reasoning and holding of *DeLoreto* to the use of the same term "threat" in another part of the same penal code. See 287 Conn. at 246-251. Indeed, in the *Cook* decision, see *Id.* 249, the Connecticut Supreme Court cited with approval the recognition by the Connecticut Appellate Court in *State v. Skidd*, 104 Conn.App. 46, 55, 932 A.2d 416 (2007), that the previous decision in *DeLoreto*, supra, means "that in order for a threat to be prohibited by statute in Connecticut, that threat must rise to the level of a 'true threat' ".

Thus, contrary to the assertion of the prosecution, in *Cook* the Connecticut Supreme Court did not hold any statute unconstitutional; rather, employing well established statutory constructions principles, the *Cook* Court merely construed the term "threat", as used in the statutory definition of a "dangerous instrument", C.G.S. §53a-3(7) (which is what the prosecutor charged the respondent with carrying in this case), as referring to a "true threat", and not to something that might sound like a threat but in

reality was a joke, hyperbole, bluff and bluster, puffery, etc. In so construing the applicable statutes, the Connecticut Supreme Court was also clearly following the intent of the Connecticut legislature, since it is more than obvious that by enacting §53-206 and §53a-3(7), the legislature did not intend to imprison people for three years for making jokes (or other non-serious, non-true "threats") about using some innocuous item they are carrying, like a baseball bat or stick or hammer or table leg, etc., in a weapon-like manner.

2. The Proper Construction of a State Statute is a Question of State Law, Not Federal Law

It should also be noted here that it is well established that the proper construction of the meaning of a state statute is a question of state law, not federal law. Indeed, this Court has expressly recognized that it is bound by the construction of a state statute made by the highest court of the state. See, *e.g.*, *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (so holding); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) (recognizing "we are bound by a state court's construction of a state statute"; also recognizing that a state court construes a statute when it "defin[es] the meaning of a particular statutory word or phrase"). All that the Connecticut Supreme Court did in the instant case was to construe C.G.S. §53-206 & C.G.S. §53a-3(7), as charged here, as stating a crime which has as an essential element the making of an actual *threat* to use the otherwise innocuous item in a

manner capable of causing death or serious physical injury in order for the item to qualify as a "dangerous instrument" (§53a-3(7)) it is unlawful to possess (§53-206). The Connecticut Supreme Court then defined the meaning of the term "threat", as used in the statutory definition of "dangerous instrument" (§53a-3(7)), as referring only to constitutionally punishable "true threats". Such a statutory construction is a matter of state law and therefore presents no substantial federal question; the *Cook* Court did not hold any statute unconstitutional. The respondent therefore questions whether this Court really has jurisdiction under 28 U.S.C. §1257(a), as claimed by the prosecution, because no statute of the State of Connecticut was held to be invalid under or repugnant to the federal constitution in this case. One must also question whether the prosecution thinks that this Court is going to tell the Connecticut Supreme Court that the federal constitution requires it to interpret its illegal weapons statutes in such a way that they criminalize the behavior of people who make non-true, non-serious "threats" (such as when joking, engaging in hyperbole, etc.) about innocuous items (non-weapons per se) they are carrying (like a stick or hammer or cane or baseball bat, etc.)? Indeed, since the distinction between a "true threat" and a non-true, non-serious "threat" is by definition the line of demarcation between those threats which can be constitutionally punished ("true threats") and those which may not be (non-true threats), see *Virginia v. Black*, 538 U.S. 343, 359-360 (2003) (so recognizing); *Watts v. United States*, 394 U.S. 705, 708 (1969)

(same), the construction of the statutes advocated by the prosecution in this case is not only NOT the construction actually adopted by the Connecticut Supreme Court (which effectively ends the issue as a matter of federal law), it is also a construction that would itself be in violation of the federal constitution.[1]

B. COUNTER-STATEMENT OF THE CASE

This was originally an appeal by the respondent, Daniel Cook, from his conviction for carrying a dangerous instrument in violation of C.G.S. §53-206 (which, *inter alia*, prohibits the carrying of a "dangerous . . . instrument") *and* C.G.S. §53a-3(7) (defining "dangerous instrument"). The respondent was originally charged with three counts: 1) threatening in the second degree, in violation of C.G.S. §53a-62(a)(1); 2) disorderly conduct, in violation of C.G.S. §53a-182(a)(1); and 3) carrying a dangerous instrument, in violation of C.G.S. §53-206 *and* §53a-3(7). The respondent was acquitted of the charge of disorderly conduct by the trial court at the close of the prosecution's case and was *acquitted* of the charge of

[1] Indeed, in *Cook* the Connecticut Supreme Court itself recognized that "the first amendment would be seriously eroded if we were to adopt the state's view that any statements or conduct conveying a threat to use an otherwise innocuous item in a manner capable of causing serious physical injury may fall within the purview of §§53-206 and 53a-3(7) irrespective of whether the threat reasonably may be characterized as a true threat." 287 Conn. at 251-252.

threatening in the second degree by the jury, but was convicted of the charge of carrying a dangerous instrument. With regard to the latter charge, the prosecution's long-form information specifically charged the respondent with "carry[ing] upon his person an instrument, to wit: a wooden table leg, which under the circumstances in which it was threatened to be used, was capable of causing serious physical injury in violation of §53-206 and §53a-3(7) of the Connecticut General Statutes". The jury was instructed that in order to find that the table leg was a dangerous instrument, they would have to find that the respondent threatened to use it in a manner in which it would be capable of causing serious physical injury. See *Cook*, 287 Conn. at 243-244 (quoting instructions).

C. ARGUMENT AND REASONS FOR THIS COURT TO DECLINE REVIEW

1. As Here Charged by the Prosecution, the Charge of Carrying a Dangerous Instrument, in Violation of C.G.S. §53-206 & C.G.S. §53a-3(7), is a Charge Which Criminalizes the Making of a Threat to Use an Innocuous Item in a Manner Capable of Causing Serious Physical Injury

It is important to start with the recognition that C.G.S. §53-206, a pre-penal code statute prohibiting carrying a dangerous weapon on one's person, applies to two different categories of weapons. The first

category of prohibited weapons consists of *weapons per se*, that is, those weapons that are expressly named within the statute, including such things as long-bladed knives, knives with switch-blades or gravity blades, martial arts weapons, brass knuckles, etc. See C.G.S. §53-206. The second category of prohibited weapons is covered by the general reference in §53-206 to carrying "any other dangerous or deadly weapon or instrument". *Id.* Since a wooden table leg (like a cane or baseball bat or hammer) is an innocuous item which is not a dangerous weapon or instrument per se, it is this second category, and specifically the phrase, "any other dangerous . . . instrument", which is applicable to the charge here.

Although there may be more than one way to define what constitutes "any other dangerous . . . instrument" for purposes of §53-206, the manner in which the prosecution chose to do so in this case, which has been approved by the Connecticut Supreme Court, see *State v. Ramos*, 271 Conn. 785, 794-798, 860 A.2d 249 (2004), was by charging in its long-form information that the respondent violated §53-206 by carrying on his person an object (a wooden table leg) that met the penal code definition of "dangerous instrument" as stated in §53a-3(7). In relevant part, §53a-3(7) provides: "'Dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ".

It is important to note that because there was no evidence whatsoever that the respondent either "used" or "attempted to use" the table leg in any manner on the day in question, the prosecution in its charging document limited itself to alleging that the table leg constituted an illegally carried "dangerous instrument" because of the manner in which it was allegedly "threatened to be used". In particular, the prosecution charged, and thus was required to prove, that on the day in question the respondent "did carry on his person an instrument, to wit: a wooden table leg, which under the circumstances in which it was *threatened to be used*, was capable of causing serious physical injury in violation of §53-206 *and* §53a-3(7)". (Emphasis added.)

This means that one of the essential elements of the prosecution's charge (that the respondent violated §53-206 by carrying a "dangerous instrument" as defined by §53a-3(7)) which the prosecution was required to prove was that the respondent, while carrying the table leg, *threatened* to use it in such a manner that it was capable of causing serious physical injury. What is most important to recognize about the charge in this case is that it is a charge which criminalizes the carrying of an innocuous item (which can literally be almost anything), not based on how the item is used or even attempted to be used, but on how it is *threatened* to be used. As here charged, therefore, §53-206 *and* §53a-3(7) together make it an unclassified felony, punishable by three years imprisonment, for a person to make a *threat* to use some

innocuous item being carried in a manner capable of causing serious physical injury. Thus, the two statutes together, as here charged, criminalize the making of a threat.

2. As Construed by the Connecticut Supreme Court, the Charge of Carrying a Dangerous Instrument, in Violation of C.G.S. §53-206 & C.G.S. §53a-3(7), is a Charge Which Criminalizes the Making of a Threat to Use an Innocuous Item in a Manner Capable of Causing Serious Physical Injury

The above-described construction of C.G.S. §53-206 & C.G.S. §53a-3(7), as here charged, is the construction of these statutes adopted by the Connecticut Supreme Court:

> In the present case, the state alleged that the [respondent] had violated §53-206 by carrying a dangerous instrument within the meaning of General Statutes §53a-3(7), which defines a dangerous instrument in relevant part as 'any instrument . . . which, under the circumstances in which it is *used* or . . . *threatened* to be used, is capable of causing death or serious physical injury. . . .' (Emphasis added.) Thus, for purposes of the present case, the state was required to establish that the [respondent's] conduct in waving the table leg, or the [respondent's] conduct coupled with his remarks, rendered the table leg a dangerous instrument for

> purposes of §§53-206 and 53a-3(7). Under [applicable First Amendment law], however, the [respondent] was entitled to an instruction that he could be convicted as charged only if his statements or use of the table leg constituted a *true threat*, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole.

Cook, 287 Conn. at 250; see also *Id.* 251 (rejecting prosecution's claim that "crime of carrying a dangerous weapon, with which the [respondent] had been charged in the present case, does not implicate the first amendment because it 'does not strike against pure speech . . . but rather various combinations of physical conduct plus speech,'" by noting "it is well established that '[t]he [f]irst [a]mendment affords protection to symbolic or expressive conduct as well as to actual speech.' . . . ").

Thus, as construed by the Connecticut Supreme Court, the crime charged in this case required the prosecution to prove that the respondent *threatened* to use the table leg in a manner capable of causing serious physical injury in order for the prosecution to be able to prove that the leg was a "dangerous instrument" which it was illegal for the respondent to carry. Although ignored by the prosecution in its Petition, it was the prosecution's decision to charge the respondent with carrying a "dangerous instrument"

as defined in §53a-3(7) for the purposes of the charge under §53-206 and it was the prosecution's decision to limit that charge to the accusation that it was illegal for the respondent to carry the table leg because "under the circumstances in which it was threatened to be used, [it] was capable of causing serious physical injury", and thus qualified as a "dangerous instrument" under §53a-3(7).

Of course, the prosecution had to do something like this, because a table leg is not one of the weapons per se that §53-206 makes it illegal to carry. It is not unlawful under §53-206 to carry a table leg or a cane or a stick or a baseball bat, or an umbrella, etc., or any of the thousands or millions of innocuous items that people can and do carry everyday, even though each of these items could be used as and has the potential of being used as a weapon. In order to prove a violation of §53-206, the prosecution has to prove beyond a reasonable doubt that the item was carried as a weapon. One way it can do this is by proving how the item was used, see *State v. Ramos*, 271 Conn. at 794-798 (accused could properly be convicted of illegally carrying a dangerous instrument in a car based on his possessing an ordinary hammer because he *used* the hammer to strike someone so it qualified as a dangerous instrument under §53a-3(7)), but the table leg was not so used in this case. So, the prosecution chose instead to allege that it was illegal for the respondent to carry the table leg because he allegedly *threatened* to use it in a manner in which it would be capable of causing serious physical injury. So charged,

the crime involves an alleged *threat* as an essential element, and so First Amendment jurisprudence concerning which threats are constitutionally punishable and which are not is directly applicable, as the Connecticut Supreme Court properly held.

3. The Connecticut Supreme Court Properly Held that the "True Threats" Doctrine Applies to Its Construction of the Crime Charged Here Under §53-206 & §53a-3(7) Because the Making of a Threat is an Essential Element of that Crime and the "True Threats" Doctrine Is To Be Applied to Any Crime Which Punishes the Making of a Threat

It is well established for purposes of free speech analysis that

> a 'threat' is very different from a 'true threat.' 'Threat' is a nebulous term that can describe anything from 'an expression of an intention to inflict pain, injury, evil, or punishment' to any generalized 'menace.' . . . Under such a broad definition, 'threats' include *protected and unprotected speech*. Thus, *states cannot enact general laws prohibiting all 'threats' without infringing on some speech protected by the First Amendment*. By contrast, 'true threat' is a constitutional term of art used to describe a specific category of unprotected speech. . . . *Watts*, 394 U.S. at 707-08. This category, although often inclusive of speech or acts that fall

> within the broader definition of 'threat,' does not include protected speech. . . . Therefore, states may, consistent with the First Amendment, prohibit all 'true threats.' . . .

(Emphasis added.) *State v. Douglas D.*, 626 N.W.2d 725, 739 (Wisc. 2001); see also *Cook*, 287 Conn. at 247 (quoting, *Douglas D.*, supra); *State v. Perkins*, 626 N.W.2d 762, 767 (Wisc. 2001) (it is undisputed "that some threatening words are protected speech under the First Amendment"; "Only a 'true threat' is constitutionally punishable under statutes criminalizing threats"). Therefore, where a statute purports to criminalize threatening speech, as §53-206 & §53a-3(7) as charged together here do, for such a statute to be constitutional it "must be read as clearly prohibiting only 'true threats'." *State v. Kilburn*, 84 P.3d 1215, 1219 (Wash. 2004); see also *State v. Johnston*, 127 P.3d 707, 709 (Wash. 2006) (statute criminalizing threats "must be construed to limit its application to true threats in order to avoid facial invalidation of the statute on overbreadth grounds . . . under the first amendment"); *People v. Benitez*, 105 Cal.Rptr.2d 242, 249 (Cal.App. 2001) (accused's "conviction cannot stand if he did not make a true threat since, absent a true threat, his words were mere speech protected by the First Amendment. So protected, they cannot be made criminal . . . Constitutionally speaking, conveying anything less than a true threat cannot constitute a crime"). It is for this reason that the Connecticut Supreme Court held, and correctly so, that

> [u]nder th[e] court's decision in *DeLoreto*, [265 Conn. 145] . . . , the [respondent] was entitled to an instruction that he could be convicted as charged only if his statements or use of the table leg constituted a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole.

Cook, 287 Conn. at 250.

4. Even the Prosecution Agrees that the Connecticut Supreme Court is Correct in Recognizing that First Amendment Jurisprudence Concerning the "True Threats" Doctrine Must Be Applied to Statutes Which Punish the Making of Threats

Ironically, even the prosecution in its Petition recognizes that there are Connecticut statutes which have the making of a threat as an essential element and therefore directly punish the making of threats. (See p.15) The prosecution even recognizes that such statutes "implicate the First Amendment as a result of directly punishing threats" (*Id.*) and thus must be given the "true threats" limiting gloss. What the prosecution fails to recognize is that the statutes charged in this case (§53-206 & §53a-3(7)), *as actually construed by the Connecticut Supreme Court*, are included on the list of statutes which have the

making of a threat as an essential element and therefore directly punish the making of a threat. Although the prosecution might not like or even agree with the Connecticut Supreme Court's actual construction of these statutes, that construction is binding on this Court and ends the prosecution's claim as a matter of federal law.

5. The Prosecution's Reliance on *Wisconsin v. Mitchell* is Misplaced Because It Amounts to Asserting that the Prosecution Prefers a Construction of §53-206 & §53a-3(7) Which is Different From that Adopted by the Connecticut Supreme Court; But This Court is Bound by the Construction of these Statutes Adopted by the Connecticut Supreme Court and *Wisconsin v. Mitchell* is Irrelevant to that Construction

In its Petition (see pp.12-16), the prosecution places heavy reliance on this Court's decision in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) and indeed, the prosecution goes so far as to claim that the Connecticut Supreme Court's decision in *Cook* is in "direct conflict" with the decision in *Mitchell*. (p.15). But there is no merit whatsoever to the prosecution's claim or to its reliance on *Mitchell* because the reasoning and analysis of *Mitchell* apply only to state statutes which do not punish speech and thus *Mitchell* is irrelevant to the statutes at issue in this case.

In *Mitchell*, this Court held that a state statute can punish an underlying crime more severely without violating the First Amendment when the prosecution can prove that the crime was motivated by racial bias. See 508 U.S. at 485-490. The *Mitchell* Court noted that the statute involved did not punish speech and that the motive for which a crime is committed is something which has long been used to enhance punishment. *Id.* 485-488. The Court further noted that the First Amendment is not offended when protected speech is used to prove a non-speech element of a crime, like motive. *Id.* 489-490.

The reason that the Connecticut Supreme Court rejected the prosecution's argument that *Mitchell* is somehow relevant to this case is obvious based on the Connecticut Supreme Court's construction of the statutes involved as defining a crime which does have speech (*i.e.*, threatening to use the otherwise innocuous item in a weapon-like manner) as an essential element and therefore directly punishes speech (*i.e.*, threatening to use the otherwise innocuous item in a weapon-like manner). As noted above, the analysis and reasoning of *Mitchell* simply do not apply to a crime which has speech as an essential element and actually punishes speech.

To try to get around this problem with its reliance on *Mitchell*, the prosecution in its Petition essentially proposes an alternative construction of §53-206 & §53a-3(7). (See pp.13-16.) This proposed alternative construction is different from that adopted by the Connecticut Supreme Court and does

not have the making of a threat as an element and does not punish the making of a threat. The prosecution's proposed alternative construction purports to start with the recognition that "the plain terms of §53-206 do not implicate speech of any kind, but only the unprotected physical act of carrying an instrument that is dangerous." (p.14). Then, according to the prosecution, the definition of "dangerous instrument" in §53a-3(7) is supposed to be viewed as referring only "to the dangerous capacity of the instrument that is carried". (p.14) "Therefore," according to the prosecution, "when §53a-3(7) defines the dangerousness of an instrument not in the abstract, but rather in terms of whether the actual use or threatened use of the instrument reveals its 'capab[ility] of causing death or serious physical injury,'" then supposedly "that definition merely identifies the instrument's threatened use as one type of evidence to be examined for purposes of proving the instrument's dangerous character. The definition does not expand §53-206's element of carrying the instrument to include its use or threatened use and expression communicated by such threats." (p.14) Putting aside for the moment other obvious problems with this proposed alternative construction of §53a-206 & §53a-3(7), the fatal problem with the alternative construction proposed by the prosecution is that it is NOT the construction adopted by the Connecticut Supreme Court.

As noted previously, the Connecticut Supreme Court's construction of §53-206 & §53a-3(7), as here

charged, recognizes that the threat to use the otherwise innocuous item in a manner capable of causing death or serious physical injury is indeed an essential element of the crime charged and that the crime charged does indeed punish speech, which it is constitutionally permissible for it to do because, as construed by the Connecticut Supreme Court, §53-206 & §53a-3(7) punish only "true threats". Thus, the prosecution's proposed alternative construction of the applicable state statutes, which was proposed to the Connecticut Supreme Court below and rejected by that Court, is now simply irrelevant as a matter of federal law. So too is the prosecution's heavy reliance of *Wisconsin v. Mitchell*. The reasoning of *Mitchell* is simply not relevant to the construction of §53-206 & §53a-3(7) actually adopted by the Connecticut Supreme Court because the actually adopted construction does have speech as an element of the crime and it does criminalize the making of a threat. The *Mitchell* Court would certainly recognize and agree that First Amendment considerations apply to such statutes construed in this manner.

In passing it should be noted that the prosecution's proposed alternative construction of §53-206 & §53a-3(7) was rejected by the Connecticut Supreme Court because it is obviously wrong and is foreclosed by the plain text of §53a-3(7). Contrary to the prosecution's alternative construction, the statutory definition of "dangerous instrument" does not merely suggest to jurors that they look to the use or threatened use of an object as somehow evidence of the

item's potential for dangerousness, rather §53a-3(7) employs the actual use or threatened use of the item and whether when so used or so threatened the item is capable of causing death or serious physical injury as the very elements that qualify or fail to qualify the item as being a "dangerous instrument".

It has long been recognized by Connecticut's jurisprudence that an item does not qualify as a "dangerous instrument" merely because the otherwise innocuous item has the potential or character of being able to be misused as a weapon. See, *e.g.*, *State v. Scully*, 195 Conn. 668, 678, 490 A.2d 984 (1985) (an iron bar and chains seized from car near Klan rally did not qualify as "dangerous instruments" under §53a-3(7) because the items were not used or threatened to be used in any manner). An illustrative case is *State v. Grant*, 177 Conn. 140, 411 A.2d 917 (1979), where the prosecution tried to elevate an attempted third degree burglary to an attempted first degree burglary on the ground that the accused was armed with a dangerous instrument, a tire iron, where an accomplice had only used the tire iron to force entry into the house before the would-be burglars fled. The Connecticut Supreme Court ruled:

> Although we conclude that sufficient evidence was presented to implicate the defendant in the attempted break-in, we agree [with the defendant] that the state failed to prove the element of a 'dangerous instrument' necessary to support a conviction for attempted burglary in the first degree in the

> manner alleged by the state. General Statutes §53a-3(7) defines 'dangerous instrument' as 'any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury.' Although it is not necessary under this definition that any physical injury actually have been inflicted . . . it is necessary that '*under the circumstances in which [the instrument was] used or attempted or threatened to be used,*' it was 'capable of causing death or serious physical injury.' (Emphasis added.)
>
> The evidence in the present case tended to establish that, at most, the 'tire iron' was used for the purpose of breaking into an apartment. There was no evidence, and, indeed, there was no claim by the state, that any of the participants in the attempted break-in used, threatened the use of, or attempted to use this object under circumstances capable of inflicting injury upon another. . . . Under these circumstances, we conclude that there was insufficient evidence before the jury to sustain a conviction for attempted burglary in the first degree [while armed with a dangerous instrument]. . . .

State v. Grant, 177 Conn. at 146. In a footnote, the Connecticut Supreme Court expressly disposed of the prosecution's claim that the dangerous character or potential of the tire iron was sufficient to qualify it as a dangerous instrument:

> The state's assertion that a tire iron is *potentially* an instrument of death or serious physical injury cannot, by itself, be the basis for a conclusion that the statutory definition had been satisfied. As we explained in *State v. Jones*, 173 Conn. 91, 97, 376 A.2d 1077 [(1977)], '[t]he statute [*i.e.*, §53a-3(7)] requires that the actual *circumstances* in which the instrument is used be considered and, then, only to determine its potential as an instrument of death or serious physical injury.' The object's potential for injury, therefore, must be examined only in conjunction with the circumstances in which it is actually used or threatened to be used, and not merely viewed in terms of its dangerous capabilities in the abstract.

State v. Grant, 177 Conn. at 146 n.5. So, it is the use or the threatened use of an otherwise innocuous item that makes it qualify as a dangerous instrument, not its character.[2] This means that the use or

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[2] It is simply bizarre for the prosecution to apparently assert that §53-206 is meant to punish the carrying of any innocuous item which has a dangerous character or capability. That is certainly not correct, since it would mean that in Connecticut one could not even carry a cane or an umbrella, or car keys, or tools, or a bottle, or a glass, or a sharpened pencil, etc. The list would be endless since virtually any item can be used to cause serious physical injury if one wants to do so and such items always have this character or capability. It is obvious, therefore, as the Connecticut Supreme Court has held, that the prosecution has to prove more than just that the innocuous item has the capability of being used as a weapon. When the prosecution, as here, chooses to rely on the statutory definition of

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the threatened use of the item is an essential element of any crime incorporating the statutory definition of "dangerous instrument".

Thus, under Connecticut law, as construed by the Connecticut Supreme Court, when the statutory definition of "dangerous instrument" is used to determine whether an accused is guilty of violating §53-206 for carrying an otherwise innocuous item that qualifies as a dangerous instrument under §53a-3(7), the use of that statutory definition does in fact add to the crime the essential elements either that the item is *used* in a manner in which it is capable of causing death or serious physical injury, see *State v. Ramos*, 271 Conn. at 794-798 (so holding), or that the item is *threatened* to be used in such a manner, *State v. Cook*, 287 Conn. at 250-251 (so holding). The decision in *Cook* therefore is not in any way inconsistent with the decision in *Wisconsin v. Mitchell*. In fact, the decision in *Mitchell* is simply not relevant to the statutes at issue in *Cook* since these statues, as construed by the Connecticut Supreme Court, do have speech as an

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"dangerous instrument", §53a-3(7), it must prove that the item was actually used or threatened to be used in a manner capable of causing death or serious physical injury. It is for this reason that, as charged here, the respondent's alleged threat to use the table leg has to be "true", because that would prove he was carrying the table leg as a real weapon because he made a true threat to use it as such; but if the alleged "threat" was not "true", because, it was non-serious, a jest, puffery, or bluster, etc., then the accused would not be carrying the table leg as a weapon and thus he could not properly be convicted of violating §53-206.

element and are aimed at punishing a form of expression, *i.e.*, the making of a true threat to use an otherwise innocuous item in a manner capable of causing death or serious physical injury.

6. Contrary to the Prosecution's Assertions, the Question of Whether an Alleged Threat Under §53-206 & §53a-3(7) Falls Outside of Free Speech Safeguards was Correctly Decided Against the Prosecution's Position by the Connecticut Supreme Court

It should be noted that there is no merit to the assertion by the prosecution in its Petition (p.16) that an alleged threat under §53-206 & §53a-3(7) falls outside of free speech safeguards because such a threat is non-speech which does not have to be communicated to anyone. As §53a-3(7) is construed by the Connecticut Supreme Court, for an otherwise innocuous item to qualify as a dangerous instrument through a threatened use thereof, that threat must be proven by the State to be "a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole."[3] *Cook*, 287 Conn.

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[3] In *State v. Jones*, supra, the accused used a hockey stick to strike the victim during an attempted robbery and the *Jones* Court held that the *use* of the stick was sufficient to prove that

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at 250. This is a proper application of the relevant First Amendment law.

In addition, the Connecticut Supreme Court properly rejected the prosecution's alternative claim in its Petition (see pp.17-18) that no "true threats" judicial gloss is required because any alleged threat to use an otherwise innocuous object in a weapon-like manner that would satisfy the requirements of §53a-3(7) would automatically be unprotected speech. The *Cook* Court rejected this claim as follows:

> The state asserts that the crime of carrying a dangerous weapon, with which the [respondent] had been charged in the present case, does not implicate the first amendment because . . . '[s]peech that, by its very utterance,' conveys a threat to use an object in a manner capable of causing serious physical injury automatically falls within the category of unprotected true threats. . . . The state's . . . assertion begs the question to be answered by the jury upon applying the true threats doctrine. . . . As a general matter . . . whether such expressive conduct represents a true threat is to be decided by the jury. . . .

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the stick qualified as a dangerous instrument under §53a-3(7). 173 Conn. at 95. The *Jones* Court held that the testimony of the victim that he did not feel threatened by the hockey stick did not matter because the stick had been used. *Id.* Had the stick not been used, but only threatened to be used, the victim's testimony that he did not feel threatened would then have been part of the overall circumstances that would be relevant to the jury's determination of whether the threat was true or not.

> We therefore agree with the [respondent] that the trial court improperly failed to instruct the jury that it could not find the [respondent] guilty of carrying a dangerous weapon under §§53-206 and 53a-3(7) unless it found, on the basis of the [respondent's] conduct or statements, that his alleged threat to use the table leg constituted a true threat and not simply idle talk, banter or some other form of protected expression.

Cook, 287 Conn. at 251-252.

In making its alternative claim, the prosecution again simply fails to recognize that certain types of alleged "threats", those that are made in jest, or that are puffery, bravado, hyperbole, exaggeration, simply not serious, etc., are constitutionally protected and that to make such a protected non-true threat with regard to an innocuous item being carried (like a baseball bat or cane) does not make it illegal to carry such an item.

In holding that the "true threats" limiting judicial gloss was required to be applied to the statutes charged in this case, the Connecticut Supreme Court noted that if the gloss was not applied then the statutes would criminalize constitutionally protected behavior in the form of every type of non-true threats imaginable, including non-serious threats that were jests, or bluster, or puffery or hyperbole, or exaggeration, or idle talk or banter, etc. 287 Conn. at 250-252.

The *Cook* Court gave one example, the softball player hypothetical,[4] that illustrated how general and basic the problem was and then noted that the one example "illustrate[d]" that

> the first amendment would be seriously eroded if we were to adopt the state's view that any statements or conduct conveying a threat to use an otherwise innocuous item in a manner capable of causing serious physical injury may fall within the purview of §§53-206 and 53a-3(7) irrespective of whether the threat reasonably may be characterized as a true threat.

287 Conn. at 251-252. Rather bizarrely, the prosecution tries to claim that the jurors would not convict the softball player, even though not instructed on the "true threats" doctrine, because they would understand the player's reference to striking the *pitcher's head* with the bat to be "demonstrative of the bat's capacity to hit a ball, not its serious potential to be used as a cudgel"! (p.18) The bald absurdity of such an assertion shows how far from reason the prosecution's position has wandered. Ironically, however, the prosecution's suggestion that the jury would only convict if the softball player was "serious" about using

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[4] "Under the state's reasoning, a batter in a softball game who jokes that she is going to hit the pitcher over the head with her bat unless he throws her an easy pitch to hit could be found guilty of carrying a dangerous weapon pursuant to a jury instruction that does no more than mirror the literal language of §§53-206 and 53a-3(7)." *Cook*, 287 Conn. at 251.

the bat as a weapon is most revealing because that is precisely what the required instruction on the "true threats" doctrine limiting gloss is intended to convey to the jurors and what was NOT conveyed by the instructions actually given. The State's own flawed reasoning therefore reveals the correctness of the Connecticut Supreme Court's decision to apply the "true threats" judicial gloss and to order a new trial before jurors properly instructed with that gloss.

Ultimately, the prosecution fails to recognize that

> [b]ecause the trial court's jury charge [in this case] contained no reference to the requirement of a true threat – in other words, because the court's instructions did not include the judicial gloss on §§53-206 and 53a-3(7) that is necessary under *DeLoreto* [265 Conn. 145] – the jury could have found the [respondent] guilty on the basis of conduct that did not rise to the level of a true threat. Consequently, under the trial court's instructions, the jury's finding of guilty could have been predicated on expressive conduct protected by the first amendment.

Cook, 287 Conn. at 251. Of course, this is not constitutionally acceptable and the Connecticut Supreme Court properly decided that the correct response was, not to hold any statute unconstitutional, but rather to construe the statutes involved by applying the "true threat" doctrine as a limiting gloss and then to order a new trial. *Id.* 251-252.

7. The Respondent is Entitled to the New Trial Ordered in this Case Before Jurors Properly Instructed on the "True Threats" Limiting Gloss Which the Connecticut Supreme Court has Construed as Being Part of the Statutes Charged

As a consequence of the Connecticut Supreme Court's decision to construe §53-206 & §53a-3(7), as here charged, by applying thereto the "true threats" doctrine as a limiting gloss, the respondent is entitled to a new trial. As the Connecticut Supreme Court properly recognized in *Cook*:

> In light of the history between the [respondent] and DelFranco, and DelFranco's conduct before, during and after the [respondent's] allegedly unlawful use of the table leg, a properly instructed jury could have found that a reasonable person in the [respondent's] position would not have foreseen that his statements and actions would be interpreted by DelFranco as a serious expression of an intent to harm but, rather, as mere banter, jest or exaggeration.

287 Conn. at 252.[5] Because of this, the trial court's constitutional error in not instructing the jurors with the "true threats" limiting gloss could not be shown to be harmless beyond a reasonable doubt. *Id.* 252-253. As the Connecticut Supreme Court correctly recognized, *Id.* 258, a new trial before properly instructed jurors is therefore required.

D. CONCLUSION

Contrary to the assertions of the prosecution, the decision of the Connecticut Supreme Court in *State v. Cook* does nothing to "erode" or "blur" this Court's First Amendment jurisprudence; rather the *Cook*

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[5] Although in *Cook* the Connecticut Supreme Court rejected the respondent's claim that the evidence of his making a "true threat" was insufficient as a matter of law, see 287 Conn. at 255-256, the *Cook* Court did state "[i]t also is true that a juror, apprised of all the relevant facts, reasonably could conclude that the [respondent's] actions were nothing more than mere puffery or bravado, prompted by DelFranco's own provocative behavior toward the [respondent]." *Id.* 255. It should be recalled that the jurors *acquitted* the respondent of the charge of *threatening* in the second degree. It should further be noted that the *Cook* Court also stated that "a reasonable juror could conclude that the [respondent] possessed the table leg only for defensive purposes". *Id.* 256 n.12. The Connecticut Supreme Court has previously held that self-defense can apply to the charge of carrying a dangerous instrument under statutes like §53-206. See *State v. Ramos*, 271 Conn. at 802-804 (when otherwise innocuous item is used in a weapon-like manner, accused may claim that such use was justified as self-defense). Article I, §15 of the Connecticut Constitution provides: "Every citizen has a right to bear arms in defense of himself . . . ".

Court properly applied that jurisprudence to the circumstances in this case and properly determined that First Amendment considerations required that the jury in this case be instructed with the "true threats" doctrine in order to ensure that the respondent could properly be convicted under §53-206 *and* §53a-3(7) for carrying a table leg, only where the table leg truly qualified as a "dangerous instrument" because the respondent is proven beyond a reasonable doubt to have made a "true threat" to use it in a manner capable of causing serious physical injury. If the respondent's alleged threat is not proven to be a "true threat" (*e.g.*, because it was non-serious, bravado, puffery, hyperbole, or a joke or protected expression of his right to bear arms in self-defense) then the alleged threat is constitutionally protected and cannot be punished. This would also mean that the carrying of the table leg was not illegal because it did not qualify as a dangerous instrument. The respondent is entitled to have his case decided before new jurors properly instructed on Connecticut's law, as these statutes have been construed by the Connecticut Supreme Court.

The petition for certiorari should be denied.

Respectfully Submitted,

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September 2008